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IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 24-273

UNITED STATES OF AMERICA,

Plaintiff,

vs.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, ET AL.,

Defendants

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, Hotel Astor, Inc., Barbizon-Plaza Hotel Co., Inc., New York State Realty and Terminal Company, Realty Hotel, Inc., Hotel Buckingham, Inc., New York Ambassador, Inc., Bowery Savings Bank, Hotel Riverside Plaza, Inc., Bowman-Biltmore Hotels Corp., Hotel Delmonico, Inc., 58-59 Realty Corporation, The Kirkeby Hotel, Inc., Jack Dempsey's Punch Bowl, Inc., 150 Central Park South, Inc., Hotel Lexington, Inc., The Lincoln, Inc., Grand Union Hotel Management Corp., Hotel New Yorker Corp., 870 Seventh Avenue Corporation, Hotel Statler, Inc., Getty Realty Corp., Ritz Carlton Hotel Co., Inc., New York Towers, Inc., Engadine Holding Corporation, St. Moritz on the Park, Inc., Vincent Astor, Savoy Plaza, Inc., Sherry Netherland Corp., Hotel Taft Corp., Victoria Bondholders Corporation, and

Wellington Hotel, Inc., defendants in the above entitled cause, submit herewith their statement showing the basis of the jurisdiction of the Supreme Court upon appeal to review the decree of the District Court.

This is a suit in equity brought in the District Court for the Southern District of New York by the United States of America, as complainant, at the instance of the Federal Communications Commission, stated by plaintiff to be under the authority of Section 401(c) of the Communications Act of 1934 (47 U. S. C., Sec. 401(c)) to obtain a judgment, order or decree against the defendant telephone companies and defendant hotel companies enjoining alleged violations of Section 203 of said Act (47 U. S. C., Sec. 203). The District Court granted the injunction against the defendant hotel companies in a judgment entered the 5th day of October, 1944.

A. Jurisdiction Statute

The statutory provisions that confer jurisdiction upon the Supreme Court to review the judgment of the District Court are:

Section 401(d) of the *Communications Act of 1934,* 48 Stat. 1092, 47 U. S. C., Sec. 401(d).

Section 2 of the *Expediting Act,* approved *February 11, 1903,* as amended, 32 Stat. 823, 15 U. S. C., Sec. 29, 49 U. S. C., Sec. 45.

Section 238(1) of the *Judicial Code,* as amended, 43 Stat. 938, 28 U. S. C., Sec. 345(1).

Section 401(d) of the Communications Act of 1934, *supra,* provides:

> "The provisions of the Expediting Act, approved February 11, 1903, as amended, and of Section 238(1) of the Judicial Code, as amended, shall be held to apply to any suit in equity arising under Title II of this Act, wherein the United States is complainant."

The three conditions set forth in this section are present in the instant case, to wit, it is a suit in equity, it arises under Title II of the Act, and the United States is the complainant.

The Supreme Court of the United States has held that the Expediting Act, approved February 11, 1903, as amended, and Section 238 of the Judicial Code, as amended, provide for direct appeal to the Supreme Court from a District Court.

Ethyl Gasoline Corporation v. *United States* (1940), 309 U. S. 436.

B. The Statute of the United States

The statute of the United States which is involved is Section 203 of the Communications Act of 1934 (48 Stat. 1070, 47 U. S. C., Sec. 203). This section reads as follows:

"(a) Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication between the different points on its own system, and between points on its own system and points on the system of its connecting carriers or points on the system of any other carrier subject to this Act when a through route has been established, whether such charges are joint or separate, and showing the classifications, practices, and regulations affecting such charges. Such schedules shall contain such other information, and be printed in such form, and be posted and kept open for public inspection in such places, as the Commission may by regulation require, and each such schedule shall give notice of its effective date; and such common carrier shall furnish such schedules to each of its connecting carriers, and

such connecting carriers shall keep such schedules open for inspection in such public places as the Commission may require.

(b) No change shall be made in the charges, classifications, regulations, or practices which have been so filed and published except after thirty days' notice to the Commission and to the public, which shall be published in such form and contain such information as the Commision may by regulations prescribe; but the Commission may, in its discretion and for good cause shown, modify the requirements made by or under authority of this section in particular instances or by a general order applicable to special circumstances or conditions.

(c) No carrier, unless otherwise provided by or under authority of this Act, shall engage or participate in such communications unless schedules have been filed and published in accordance with the provisions of this Act and with the regulations made thereunder; and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule.

(d) The Commission may reject and refuse to file any schedule entered for filing which does not provide and give lawful notice of its effective date. Any schedule so rejected by the Commission shall be void and its use shall be unlawful.

(e) In case of failure or refusal on the part of any carrier to comply with the provisions of this section or of any regulation or order made by the Commission thereunder, such carrier shall forfeit to the United

States the sum of $500 for each such offense, and $25 for each and every day of the continuance of such offense."

C. Dates of Judgment and Petition for Appeal

The date of the final judgment of the District Court here sought to be reviewed is October 5, 1944. It reads as follows:

"This cause having come on for trial before the undersigned on the 26th, 27th and 28th days of June, 1944, and the proof of all the parties having been adduced, and the motions of the defendants to dismiss the complaint having been denied, and the Court having rendered its opinion dated August 31, 1944, which opinion was filed in the office of the Clerk of the United States District Court for the Southern District of New York on September 7, 1944, and the undersigned having on the 5th day of October, 1944, made findings of fact and conclusions of law in support of its judgment, it is

Ordered, Adjudged and Decreed that the defendant hotel companies and each of them and all persons acting under the authority or control of each of them, including their officers, agents and servants, be and they hereby are enjoined from charging, demanding, collecting or receiving any charge for or in connection with any interstate or foreign message toll telephone service to or from the premises of defendant hotel companies, other than the message toll telephone charges set forth in the applicable and effective tariff schedules of defendant telephone companies on file with the Federal Communications Commission and the applicable taxes, and it is

Further Ordered, Adjudged and Decreed that the defendant telephone companies and each of them and all persons acting under the authority or control of each of them, including their officers, agents and servants, be and they hereby are enjoined from furnishing interstate or foreign message toll telephone service to such of the defendant hotel companies as continue to

charge, demand, collect or receive any charge for or in connection with any interstate or foreign message toll telephone service to or from the premises of such defendant hotel companies other than the message toll telephone charges set forth in the applicable and effective tariff schedules of defendant telephone companies on file with the Federal Communications Commission and the applicable taxes.

Dated: Utica, N. Y., October 5, 1944.

STEPHEN W. BRENNAN,
United States District Judge."

Petition for allowance of appeal was presented on November 28th, 1944.

D. Substantial Nature of Questions Involved

This case involves the question of whether or not the Federal Communications Commission, under the Communications Act of 1934, has jurisdiction to prevent hotels from collecting from guests a service charge for services rendered by the hotels to the guests, by their own employees and with equipment rented and paid for by them, because such charges are made to guests who have made long distance or toll calls.

This method of making service charges has been the practice in the hotel industry throughout the United States during most of the time telephone service has been available to hotel guests.

Thirty-two hotels in the City of New York are directly involved in this case. The principle involved is of importance to practically every hotel in the United States, as the service charges above described are nearly universal in the hotel industry.

The financial considerations are substantial. Charges amounting to several thousand dollars, on the average for each hotel each year are involved. The aggregate amount of charges each year of the hotels directly involved in this

case will exceed one hundred thousand dollars. The aggregate amount of charges each year of all the hotels affected by the question involved is beyond ready computation, but it is a large figure.

Opinion

A copy of the opinion of the Court is affixed hereto and marked Exhibit A.

Conclusion

It is thus clear that this appeal is within the exclusive jurisdiction of the Supreme Court and involves the review of substantial errors of the trial Court.

November 28th, 1944.

Respectfully submitted,

LORD, DAY & LORD,
By GEORGE DE F. LORD,
A member of the firm. Attorneys for Hotel Astor, Inc., et al. Office & Post Office Address: 25 Broadway, New York 4, New York.

NEWMAN & BISCO,
By LEONARD G. ZISER,
A member of the firm. Attorneys for The New Yorker Hotel Corporation. Office & Post Office Address: 29 Broadway, New York 6, New York.

FREDERICK L. WHEELER,
Attorney for New York State Realty and Terminal Company and Realty Hotels, Inc. Office & Post Office Address: 466 Lexington Avenue, New York 17, New York.

EXHIBIT A

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Civil No. 24-273

UNITED STATES OF AMERICA, Plaintiff,

vs.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, et al. Defendants

APPEARANCES:

Hon. James B. M. McNally, United States Attorney, for the Government, United States Court House, New York City.

Mr. Marvin M. Notkins, Asst. U. S. Attorney, of Counsel.

Mr. Frederick L. Wheeler, Attorney for Defendants, New York State Realty & Terminal Company and Realty Hotel, Inc., 466 Lexington Avenue, New York City.

Mr. Samuel H. Hellenbrand, of Counsel.

McNamara & Seymour, Attorneys for defendant, Hotel Waldorf Astoria, 120 Broadway, New York City.

Mr. Stuart McNamara and Mr. U. S. Grant, of Counsel.

Newman & Bisco, Attorneys for Defendant, Hotel New Yorker, 29 Broadway, New York City.

Mr. Gerard I. Walters, of Counsel.

Mr. T. Brooke Price, Mr. John T. Quisenberry and Mr. Edmund S. Hawley, Attorneys for Defendant, American Telephone and Telegraph Company, 195 Broadway, New York City.

Lord, Day & Lord, Attorneys for Defendants, Hotel Astor, Inc., Barbizon-Plaza Hotel, Hotel Buckingham, New York Ambassador, Bowery Savings Bank, Hotel Riverside Plaza, Bowman-Biltmore Hotels, Corp., 58-59 Realty Corp., The Kirkaby Hotel, Jack Dempsey's Punch Bowl, 150 Central Park South, Inc., Hotel Lexington, The Lincoln, Grand Union Hotel Management, 870 Seventh Avenue Corp., Hotel Statler, Getty Realty Corp., Ritz Carlton Hotel Company, Eugadine Holding Corp., St. Moritz-on-the Park, Vincent

Astor, Savoy Plaza, Sherry-Netherlands, Hotel Taft, Victoria Bondholders Corp., and Wellington Hotel, 25 Broadway, New York City.

Mr. Parker McCollester, and Mr. Herbert Brownell, Jr., of Counsel.

Ralph W. Brown, Attorney for Defendant, New York Telephone Company, 140 West Street, New York City.

Mr. Frank A. Fritz and Mr. John Machan, of Counsel.

Trial commenced June 26, 1944; Completed June 28, 1944; Submitted July 27, 1944; Decided August 31, 1944.

BRENNAN, District Judge.

Opinion

This action, instituted upon the request of the Federal Communications Commission, hereinafter referred to as "the F.C.C.", and prosecuted under the direction of the Attorney General of the United States, pursuant to Section 401 (c) of the Communications Act of 1934, as amended, (47 USCA 401 (c), seeks to enjoin the claimed violation by the defendants of Section 203 of the Communications Act, (47 USCA 203).

The defendants, the American Telephone and Telegraph Company and the New York Telephone Company, are corporations engaged in interstate and foreign communications by wire within the meaning of the said Federal Communications Act of 1934, as amended.

The remaining defendants about thirty in number are individuals, partnerships and corporations engaged in the operation of hotels, all located within the City of New York, and may be referred to generally as "hotel companies". They are named as defendants in this action by virtue of the provisions of 47 USCA 411; it being claimed that the practices in use by them in the matter of charges made to hotel guests in connection with the making of interstate telephone calls by such guests from within the hotel premises constitute violations of a tariff filed by the New York Telephone Company with the F.C.C. on February 11, 1944, which tariff was concurred in by the defendant, the American Telephone and Telegraph Company, and which by its terms became effective on February 15, 1944.

The tariff above referred to, insofar as it is applicable here provides as follows:

> "Message toll telephone service is furnished to hotels, apartment houses and clubs upon the condition that use of the service by guests, tenants, members or others shall not be made subject to any charge by the hotel, apartment house or club in addition to the message toll charges of the Telephone Company as set forth in this tariff."

The facts are not seriously in dispute. The differences in this action arise by reason of the conclusions to be drawn from the facts and the application of the law applicable thereto.

The pertinent facts as to the hotels' interest in and connection with the telephone service rendered to guests may be generally summarized as follows:

The guest rooms of the several hotels are provided with the necessary equipment so that guests may communicate by means thereof with other guest rooms within the hotel, or with facilities afforded by the hotel for the comfort and convenience of the guests, such as valet, room and management service. The same facilities also enable the guest to communicate with persons outside of the hotel structure, and may afford either intrastate or interstate means of communication. The equipment necessary for this service is generally owned by the Telephone Company, maintained and inspected by it, and is made available upon the written request of the several hotels which ordinarily pay a monthly rental charge for the equipment used. The main difference between the means and methods used in providing telephone service to a personal subscriber and to defendant hotels is that in the case of the personal subscriber the wires of the telephone company convey the message from the transmitting instrument to the receiving instrument without action by the subscriber other than the ordinary physical action required in receiving or transmitting the message. In the case of the hotels, there is installed therein a private branch exchange, referred to as "PBX," by means of which a connection is made by the operator be-

tween the outside telephone trunk lines and the extension lines running from the PBX to the several guest rooms or hotel facilities. The PBX board is installled by the telephone company; it is operated by hotel employees who are under no control of the telephone company, but are instructed by it in the performance of their duties.

In actual practice the furnishing of telephone service by the hotel companies to their guests involves a large capital outlay and continuing "overhead expense," the details of which it is not necessary to describe.

For some years the hotels have adopted methods intended to reimburse them, in part at least, for such outlay and expense, which methods are the bases of the plaintiff's claim for relief herein.

When a guest makes an interstate telephone call from his hotel room, the ordinary procedure requires that he, by using the room telephone, attract the attention of the PBX operator to whom he gives the name, address or telephone number of the person with whom he wishes to communicate. Connection is then made between the room extension and the outside trunk line. The operator, or in some instances, the guest, through the mechanism of the PBX board, transmits the information over the trunk lines of the telephone company to the telephone toll operator, and the message is completed in the ordinary manner. The PBX operator makes a notation of the name of the guest, his room number, the name, address and telephone number of the person called, and the time length of the call. Through the hotel clerical force, the charge made by the telephone company, according to its filed tariff, is computed; the tax thereon is computed, and an additional charge, variously referred to as "service charge" or "surcharge" is added. Either the individual items or the total charge is noted upon the account of the guest, and he is expected and required to make payment thereof in the due course of business.

It is the claim of the plaintiff that the above practice constitutes a violation not only of the tariff referred to above, but of the Communications Act itself, even without the supplement of the particular tariff.

The surcharge or service charge is generally based upon the amount of the toll charge made by the telephone company, plus the tax, and is graduated accordingly. It has little or no relationship to the service rendered by the hotels in connection with the particular call. No charge is made for hotel inter-communication or incoming local or interstate calls, although the service rendered by the hotels and equipment used is substantially the same as in the case of outgoing interstate calls. A charge is made for outgoing intrastate calls, such charge being in according with the provisions of the tariff filed with the New York State Public Service Commission.

That the hotels furnish convenient telephone service to their guests at considerable expense may be conceded, and they urge that business experience dictates that it is both convenient and equitable that the charge therefor be borne in part by the guest using his room phone for interstate telephone communication. It is not necessary to agree or to disagree with such contention, if the tariff involved is valid, and the practice constitutes a violation thereof, as claimed by the plaintiff.

The issues here are concise and must be approached in the light of the expressed purpose of the Communications Act (47 U. S. C. A. 151; Scripps Howard Radio, Inc. *v.* F. C. C., 316 U. S. 4). They involve a determination as to jurisdiction of the parties and subject matter, and the validity of the tariff. If the tariff is found to be valid, then it must be determined whether or not the defendants have violated same.

No serious question is raised as to the extent of the judicial power to review the proceedings underlying this action. Although some evidence was received which bears upon the amount of the surcharge made by the defendant hotels, it is conceded that the reasonableness of such charge is not before this Court. It is, however, urged that the nature of the services rendered by the hotels, the relationship of the interested parties, and the provisions of the Communications Act require the dismissal of the complaint as to hotels.

That the Communications Act contemplates the regulation of interstate wire communication from its inception to its completion is confirmed by the language of the statute and by judicial decisions.

United States of America v. American Telephone & Telegraph Co., et al., Decided April, 1944, District of Columbia;

People, Ex Rel Public Service Commission v. New York Telephone Co., 262 A. D. 440; affirming 175 Misc. 128;

Hotel Pfister, Inc. v. Wisconsin Telephone Company, 203 Wisconsin 20; 233 N. W. 617.

The contention that wire communication within the meaning of the Communications Act ends at the PBX board and is not thereafter subject to the regulation is, therefore, rejected. The above statement necessarily implies a finding that this proceeding involves wire communication as defined in the Communications Act.

The contention that the services rendered by the hotels constitute "telephone exchange service" within the purview of the Act, and, therefore, are exempt from jurisdiction of the F. C. C. (47 U. S. C. A. 221-b) is contradicted by the evidence when applied to the definition of "telephone exchange service" as contained in the Act (47 U. S. C. A. 153-r).

The nature of the services rendered by the hotels needs no extended discussion. The defendant hotels in substance claim that the surcharges in question are imposed for hotel and secretarial service rendered to their guests, and that, as such, they are not subject to regulation. The evidence plainly indicates that the greater portion of such service is afforded by the hotels to their guests as a matter of hotel accom-odation and to meet business competition. It is not necessary to attempt to decide how much of the service rendered may be considered as hotel service. The fallacy of defendants' argument is that regardless of the nature of the service rendered and of the cost thereof, reimbursement is sought by imposing upon interstate toll telephone service an arbitrary charge which increases the charge for such service above the limit prescribed by reg-

ulation. The fact that the amount of such charge is allocated to meet the cost of some particular hotel service rendered is not material. It is not the province of this Court to enter into the realm of hotel management. It is enough to state that public utility service may not be the subject of unregulated resale by the subscriber to balance a business deficit.

This brings us to the question as to the relationship between the defendant hotels and defendant telephone companies, as it is contended that the services rendered by the hotels are not subject to regulation by the F. C. C. or by the provisions of the Communications Act, unless the hotels are acting as agents of the common carrier, as in People Ex Rel Public Service Commission v. New York Telephone Company, supra. There is no evidence of such agency. The hotels are subscribers for telephone service. The argument above outlined, however, is not applicable, as there is no attempt to regulate the service rendered by the hotel. Rather, the Communications Act and the tariff is applicable to the charge made for interstate wire communication. The hotels may render to their guests any service which business judgment may dictate, but they may not impose the cost thereof upon the use of a public utility service. It is true that the Communications Act refers to the carriers, but it is also true that hotels as subscribers are bound by the effective tariffs filed by the carriers.

47 U. S. C. A. 411 (a).

Lowden v. Simonds, etc., Grain Co., 306 U. S. 516 at 520.

The determination of the above issues raised in this case both at the trial and in the briefs of the parties brings us back to the consideration of the validity of the tariff, which, by its terms, became effective February 15, 1944.

The case of United States of America v. American Telephone and Telegraph Company, et al., recently decided in the District Court of the United States for the District of Columbia, is similar to the instant case, except that there is raised in this case the claim that the tariff upon which the action is based is actually of no force and effect,

and is invalid by reason of the fact that it constitutes a change in the regulations existing prior to February 15, 1944, on less than thirty days' notice in violation of Section 203 (b) of the Federal Communications Act.

There is no question but that it is desirable that interested parties be given notice sufficient in point of time that they may conform their business practices to any new regulation. The statute contemplates that such change be made on thirty days' notice, but the F. C. C. may in its discretion and for good cause shown modify such requirement. Modification was made in this instance after written application had been made by the telephone company for permission to file the tariff in question. The defendants strenuously urge that such application and permission were ineffective in that there was no "good cause shown" therefor. The statute is silent as to what constitutes "good cause" or as to how same must be shown to the F. C. C. before the exercise of its discretion is warranted.

We have here the strong presumption that the action taken by the F. C. C. was entirely legal. (R. H. Stearns Co. v. U. S., 291 U. S. 54; U. S. v. Chemical Foundation, Inc., 272 U. S. 1.) The language of the opinion in the last cited case indicates that it is questionable whether the basis of fact on which the action of the F. C. C. rests is open to challenge.

The Court's attention is also called to the language of 47 U. S. C. A. 203 (d), and it is urged that a tariff which offends the provisions of law as claimed by the defendants may be rejected and is, therefore, void, but if such tariff is actually accepted and filed, long continued administrative construction holds that such a tariff becomes legally effective according to its terms. Such argument passes over the requirement that the statute contemplates a notice to the public before a change in the charges, etc. is made. It is not necessary to decide this question on either of the above contentions, as the record shows that in the District of Columbia an investigation as to the practice of the hotels involving service or surcharges has been conducted by the F. C. C. and while the report of its investigation and findings are not binding upon the defendants herein, it is a basis upon which the discretion of the F. C. C.

could be exercised. If the Washington investigation disclosed a condition which warranted the filing of a tariff affecting the hotels in the District of Columbia, certainly we can not shut our eyes to the fact that it might be advisable at least that such tariff be speedily made uniform in its application, even without specific investigation or specific findings as to the condition existing in New York City. Such action is one of the purposes of the Act.

That the application did not conform to the rules of the F. C. C. did not void action thereon, as the rules were imposed by the Commission and its action waived the requirements thereof.

The conclusion is reached that the tariff was lawfully filed, is lawful in its form and scope, and is valid.

The evidence shows that the message toll telephone service furnished to the hotels for the use of their guests has been made subject to a surcharge by the hotels. The hotels, as subscribers to the telephone service, are bound to observe the conditions upon which such service is furnished. The violations of such conditions constitute a violation of the provisions of the tariff and should be enjoined.

The facts shown on the trial lead to the conclusion that the defendant telephone companies are continuing to furnish toll telephone service, which is being made subject to a charge by the defendant hotels. While the carrier is not responsible for the action of the hotels, the furnishing of such service, in violation of the conditions imposed by the tariff, constitutes a violation thereof. It is the Court's concern to provide an effective remedy with the least possible injury to the public, and, therefore, an injunction may issue against the defendant telephone companies, enjoining them from furnishing message toll telephone service to such of the defendant hotels as continue to subject such service by its guests to any charge other than the message toll charges of the telephone company itself.

Motions made by the defendants to dismiss the complaint are denied, and the motion of plaintiff for judgment is granted in accordance with this opinion.

No. 823. HOTEL ASTOR, INC. ET AL. *v.* UNITED STATES ET AL. Appeal from the District Court of the United States for the Southern District of New York. May 28, 1945. *Per Curiam:* The judgment is affirmed. *Ambassador, Inc.* v. *United States, ante,* p. 317. *Messrs. George deF. Lord, Leonard G. Bisco, Frederick L. Wheeler* and *Parker McCollester* for appellants. *Messrs. John B. King* and *Ralph W. Brown* for the New York Telephone Co., appellee. Reported below: 57 F. Supp. 451.